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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

KELVIN DARRYL SMITH,

Defendant and Appellant.

B168440

(Los Angeles County  
Super. Ct. No. TA068162)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Ronald V. Skyers, Judge. Affirmed.

Michael A. Younge for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, William T. Harter and Michael A. Katz, Deputy Attorneys General, for Plaintiff and Respondent.

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Kelvin Darryl Smith appeals from the judgment entered following a jury trial resulting in his conviction of petty theft with a prior conviction (Pen. Code, § 666.)<sup>1</sup> The jury found that he had four prior convictions of a serious or violent felony qualifying him for sentencing pursuant to the “Three Strikes” law (§§ 667, subds. (b)-(i); 1170.12) and that he had served a separate prison term for a felony (§ 667.5, subd. (b)). At sentencing, the trial court exercised its discretion pursuant to section 1385 and struck three of the four “strike” convictions. It then sentenced appellant to an aggregate term of five years in state prison.

He contends that “[t]he bike was abandoned and not unique therefore as a matter of law, the defendant should not have been found guilty of petty theft,” and that “[t]he defendant was not predisposed to steal the bike and was entrapped.”

We reject the contention and affirm the judgment.

### **THE FACTS AND THE PROCEDURAL HISTORY**

Viewed in accordance with the usual rule of appellate review (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11), the evidence established that in late 2002 and early 2003, there was a rash of bicycle thefts at the Long Beach transit station on the Metro Green Line, which is located at Long Beach Boulevard and the 105 Freeway in Lynwood. Deputies from the Los Angeles Sheriff Department’s Transit Services Bureau organized an eight-deputy sting operation.

On January 10, 2003, shortly before 9:15 a.m., an undercover deputy, Deputy Michael Shaw, rode a bicycle into the station, propped it up against a wall of the west staircase, and left the bicycle there unattended and unsecured. The bicycle was used, and it was operable and in good repair. At trial, a deputy estimated the bicycle’s value at \$300.<sup>2</sup> Deputy Shaw went up the escalator, and the deputies conducted a surveillance of the unattended bicycle.

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<sup>1</sup> Unless otherwise specified, all further statutory references are to the Penal Code.

<sup>2</sup> The prosecutor had the bicycle in court so that the jury could observe its appearance. One of the deputies testified that commonly, the bike racks at a transit

A period of time passed during which the deputy sheriffs kept the bicycle under surveillance. Then on foot, appellant approached the bicycle. He stopped and checked the bicycle, apparently to see if it was operable. He looked around the station as if to determine if anyone would be concerned if he took the bicycle. Then he got on the bicycle, rode it to the curb, and rode it southbound on Long Beach Boulevard.

Deputy Larry Ware radioed Detective Ronald Smith and a companion deputy that an older male wearing gray jeans and a blue jacket had taken the bicycle and that the thief was pedaling off southbound on Long Beach Boulevard. Detective Smith responded with his companion deputy in a police car. Detective Smith ordered appellant to stop. Using a ruse, the detective engaged appellant in small talk to discover if appellant had the intent to steal. During their conversation, appellant told the detective that he was taking the bicycle home and that it belonged to his 13-year-old son. Appellant was arrested, and during booking, the transporting deputy found a screwdriver in appellant's possession.

Deputy Shaw testified that after appellant was stopped, he ran up to the appellant and the detective and said something like, "That's my bike" or "I'm missing my bike." Deputy Shaw could not recall if appellant responded to his comments. The deputy only recalled that appellant did not say much. At some point, however, appellant had said, "[T]his [is] going to go to trial."

At trial, appellant proceeded in propria persona. In defense, he personally testified. His major line of defense was an argument that the deputies' conduct amounted to entrapment. He testified that he was not guilty because the deputy sheriffs' sting operation "was an encouragement operation that turned into an entrapment." He also testified that when he observed the bicycle, he concluded that it was abandoned.

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station are full or in need of repair. Thus, usually, where the Green Line patrons are unable to use the bicycle racks provided by the Metropolitan Transit Authority, bicycles will be left locked at various locations around the station, such as locked around the bottom of light standards.

Appellant explained that he saw the bicycle as he walked out of the elevator from the Green Line platform. He thought that the bicycle looked “out of place” because it was not in the bicycle rack area and no one was nearby. Appellant said that the bicycle’s tires were mismatched, one tire was “low,” its chain looked loose, the seat was torn, and “it looked kind of beat up” or “raggedy.” He concluded that the bicycle was abandoned because it looked like “somebody just put it there and kept running” and it looked like a “throwaway.” So he took it.

He got on the bicycle and rode it off. Then, he got off and walked the bike because he was too big for it, “the chain kept messing up,” and he kept “wobbling.” While he was walking, the deputies detained him and engaged him in a ruse so as to trick him into revealing his intent with respect to the bicycle. Detective Smith said to him, “Hey aren’t you the man . . . we stopped yesterday. You gave us a false name.” In between talking to him about being an escaped suspect, Detective Smith questioned him about the bicycle. Appellant said that he had panicked because he was afraid of the police, and in reply to their inquiries, he may have told them stories, such as when the officer asked him to whom the bicycle belonged, he said that it belonged to his son. Also, when Detective Smith asked him where he was taking the bicycle, he told the detective that he was taking it home. When he said this, he did not know that the deputies were questioning him about the bicycle.

Appellant repeated that he was certain that the bicycle did not belong to someone else because of “how it looked.” He said that he doubted if its value exceeded \$50, and in court, he claimed that the bike looked better than it did at the transit station. He said that in court, its chain appeared to have been tightened and its tire was now full of air.

Appellant also attempted to bolster his defense by claiming that his screwdriver was merely the size of a pen, that he was aware there was a security camera pointed to the nearby automated ticket dispensers, and that as in prior cases where he was charged, he only demanded a trial when he was innocent. Appellant voluntarily revealed the entirety of his criminal record to the jury.

During cross-examination, appellant admitted that the first time he had ever seen the bicycle was on January 10, 2003. When the prosecutor observed that the bicycle was a Schwinn and that in court, the bicycle looked as if it was in fairly good condition, appellant replied, “Well, to tell you the truth, Ma’am, I saw a little biddy bike that I could probably fix up and give to my 13-year-old son.” The prosecutor suggested during her cross-examination of appellant that he did not go to trial only when he was innocent; he went to trial when there was no offer of a grant of probation.

Appellant called his mother as a character witness. She testified that if appellant “believes it’s something true[,] he would rather suffer the consequences than to give in to something he does not believe is true.” The mother also said that appellant had told her that he saw a bicycle that had a tire that looked to be “half flat” and the chain was loose. It was not secured like the other bicycles in the area. He said that he had concluded that the bicycle was abandoned, and he thought he could fix it up for his son. At the time of the theft, appellant was not working, and his income was limited to S.S.I.

After the evidence was completed, inter alia, the trial court charged the jury with CALJIC No. 4.60, concerning entrapment -- when it is a defense and the burden of proof, with CALJIC No. 4.61, concerning the elements of the defense of entrapment, and with CALJIC No. 4.61.5, concerning permissible and impermissible police conduct.

In arguing the case to the jury, appellant did not explicitly rely on a defense of abandonment. He argued that the prosecution did not prove the case beyond a reasonable doubt and that he had been entrapped. Nevertheless, the prosecutor argued inter alia, that the circumstances under which appellant found the bicycle did not indicate that the bicycle had been abandoned.

## **DISCUSSION**

Appellant’s two contentions amount to a claim that the trial evidence was insufficient to support his conviction. We disagree.

“Claims challenging the sufficiency of the evidence to uphold a judgment are generally reviewed under the substantial evidence standard. Under that standard, “an appellate court reviews the entire record in the light most favorable to the prosecution to

determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find [the elements of the crime] beyond a reasonable doubt.”” (*People v. Bolden* (2002) 29 Cal.4th 515, 553, quoting *People v. Kipp* (2001) 26 Cal.4th 1100, 1128; see *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.) “““If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.””” (*People v. Bean* (1988) 46 Cal.3d 919, 933, quoting *People v. Hillery* (1965) 62 Cal.2d 692, 702.)” (*In re George T.* (2004) 33 Cal.4th 620, 630-631; accord, *People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Here, transit authority deputies conducted a sting operation in which an undercover deputy left a bicycle in good condition unlocked in the Green Line station. They arrested any person who took the bicycle and who did not indicate upon detention that they intended to return the bicycle to its rightful owner. The deputies testified to appellant entering the area of the bicycle, examining the bicycle, which was in good condition and valuable. They saw appellant take the bicycle by riding it out of the station. When appellant was detained, he falsely claimed that it was his and that it was his son’s bicycle. Appellant testified to facts amounting to an abandonment at trial. But that claim was based on a set of facts that the jury determined did not exist – that the bicycle was in poor condition and it was likely abandoned because it was of no value. In this case, the bicycle was in court for the jury to observe, and a deputy testified that it was in the same condition as when it was used as a decoy. The trial evidence was ample to support appellant’s conviction.

Additionally, in support of his first contention -- that the “bicycle was abandoned and not unique; therefore, as a matter of law, the defendant should not have been found guilty of petty theft” -- appellant argues that the decision in *People v. Lapcheske* (1999) 73 Cal.App.4th 571 (*Lapcheske*) supports his claim. However, the decision in *Lapcheske* is not on point.

The defendant in *Lapcheske* was convicted of rent skimming, a violation of Civil Code section 890, and of conspiracy to commit grand theft. At trial, the defendant claimed that he had taken possession of real properties that were seemingly abandoned for the purpose of adverse possession, and he argued that because he was involved in taking properties for adverse possession, he could not be convicted of crimes involving the illegal occupation of real property. (*Lapcheske, supra*, 73 Cal.App.4th at pp. 573-574.) The court rejected his claim as a matter of legislative intent with respect to the violation of Civil Code section 890. (*Lapcheske*, at pp. 574-575.) However, with respect to the count 9 count of conspiracy to commit grand theft, the reviewing court acknowledged that appellant's claim was cognizable. Explaining that "until challenged, an adverse possessor has a right equal to that of the actual title holder to place a tenant in possession of the property and collect rent from that tenant," the Court of Appeal concluded that the defendant had the same right vis-à-vis the mortgage holder. (*Id.* at p. 576.) The Court of Appeal reasoned that because the person in physical possession of the real property has the legal right to install a tenant on the property and to keep rents, the defendant did not commit conspiracy to commit grand theft and reversed appellant's conviction of conspiracy. (*Ibid.*)

Our situation is distinguished from *Lapcheske* by its facts. We are reviewing a conviction of the theft of personal property. Rules regarding the occupation of real property and adverse possession do not apply to the taking of personal property. That is not to say that there is no similar defense when the theft is of personal property. A claim of right or a mistake of fact, which would negate the specific intent required for theft, are defenses to theft. (*Morissette v. United States* (1952) 342 U.S. 246; *People v. Wooten* (1996) 44 Cal.App.4th 1834 [embezzlement]; *People v. Navarro* (1979) 99 Cal.App.3d Supp. 1 [theft].<sup>3</sup>

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<sup>3</sup> Appellant makes no claim that the trial court improperly failed to instruct the jury with respect to a claim of right, a mistake of fact, or abandonment.

In our case, in appellant's testimony, he, in effect, asserted that he reasonably and honestly believed that the bicycle was abandoned, thereby claiming that he did not have the requisite intent to steal. During final argument, the prosecutor addressed whether the prosecution had proved appellant's guilt beyond a reasonable doubt, whether appellant had a good faith reasonable belief in concluding that the bicycle was abandoned, and whether appellant had the intent to steal. The jury weighed the evidence and credibility and determined that the deputies were telling the truth and that appellant had the intent to steal. On this record, the issue of appellant's intent was one for the jury.<sup>4</sup>

Appellant also asserts that the facts adduced at trial were such that as a matter of law, when he took the bicycle, he was entrapped.

In *People v. Watson* (2000) 22 Cal.4th 220, 223, the Supreme Court explained the law of entrapment. "In California, the test for entrapment focuses on the police conduct and is objective. Entrapment is established if the law enforcement conduct is likely to induce a *normally law-abiding person* to commit the offense. ([*People v.*] *Barraza* [(1979)] 23 Cal.3d [675,] 689-690.) '[S]uch a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect -- for example, a decoy program -- is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime.' (*Id.* at p. 690.) [¶] The *Barraza* court described two guiding principles. 'First, if the actions of the law enforcement agent would generate in a normally law-abiding person a motive for the crime other than ordinary criminal intent, entrapment will be established.' ([*Id.*] at p. 690.) 'Second, affirmative police conduct that would make commission of the crime unusually attractive to a normally law-abiding

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<sup>4</sup> Although appellant testified that he believed the bicycle was abandoned, during his final comments to the jury, he argued only entrapment and that the People did not prove guilt beyond a reasonable doubt.

person will likewise constitute entrapment. Such conduct would include, for example, a guarantee that the act is not illegal or the offense will go undetected, an offer of exorbitant consideration, or any similar enticement.’ (*Ibid.*)”

The trial court properly charged the jury with the elements of the defense of entrapment. The evidence discloses no overreaching by the deputies. In this case, the deputies left the unlocked bicycle in the transit station as a decoy. They wanted to arrest whoever attempted to steal the bicycle as a means of catching the persons stealing bicycles from the station and to deter further thefts. There was no entrapment as a matter of law. The mere use of the unlocked bicycle as a decoy was not sufficient to constitute entrapment.

#### **DISPOSITION**

The judgment is affirmed.

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\_\_\_\_\_, P. J.  
BOREN

We concur:

\_\_\_\_\_, J.  
DOI TODD

\_\_\_\_\_, J.  
ASHMANN-GERST